

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SEAN HOWARD,

Plaintiff,

No. C 13-1111 PJH

v.

**ORDER**

OCTAGON, INC.,

Defendant.  
\_\_\_\_\_ /

The motion of defendant Octagon, Inc. ("Octagon") for an order dismissing, staying, or transferring the above-entitled action, and the motion of plaintiff Sean Howard for an order staying arbitration, came on for hearing before this court on July 24, 2013. Octagon appeared by its counsel Danielle Ochs and Timothy L. Reed, and plaintiff appeared by his counsel Adam J. Tullman. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS Octagon's motion in part and DENIES it in part, and DENIES plaintiff's motion, as follows.

**BACKGROUND**

Plaintiff was employed by Octagon from August 2006 until March 2013, pursuant to a letter agreement ("the Agreement") dated July 10, 2006. Octagon is an agency that is in the business of sports/talent management, marketing, public relations, and representation of and consulting to athletes and "personalities." Among other things, Octagon represents former and current football players, and as part of that representation, negotiates playing contracts, organizes and manages endorsements, speaking, and other opportunities, and provides career management. Plaintiff was employed as a sports agent in Octagon's "Football Division."

1 The July 10, 2006 Agreement included a number of provisions that would become  
2 effective in the event of the termination of employment by either plaintiff or Octagon. Of  
3 particular significance here is ¶ 7 of the Agreement, which provided that following the  
4 period of plaintiff's employment with Octagon, plaintiff would pay Octagon, "as  
5 consideration for [Octagon] having funded the development of [plaintiff's] relationship with  
6 any of [Octagon's] clients," certain percentages of "any and all fees or other compensation  
7 received directly or indirectly by [plaintiff] in connection with any such client," with the  
8 amounts depending on whether the contracts were renewals or were new.

9 Specifically, if the contracts involved "extensions, modifications, and/or renewals,"  
10 after the termination of plaintiff's period of employment, of contracts that previously existed  
11 for Octagon's clients during that employment period, plaintiff would pay 100% for the first  
12 and second years following the employment period, 70% for the third year, 50% for the  
13 fourth year, 35% for the fifth year, and 20% for the sixth year. If the contracts were "new" –  
14 that is, entered into by such Octagon clients after plaintiff's period of employment – plaintiff  
15 would pay 100% for the first and second years, 50% for the third year, 40% for the fourth  
16 year, and 30% for the fifth year. Agreement ¶ 7.

17 In addition, the Agreement included an arbitration requirement, a forum-selection  
18 clause, and a choice-of-law provision:

19 All controversies or claims arising out of or relating to this Agreement, or the  
20 breach thereof, shall be settled by arbitration in accordance with the Rules of  
21 the American Arbitration Association. The findings of the arbitrator shall be  
22 final, binding, and non-appealable. Judgment upon the award may be  
23 entered in any court having jurisdiction thereof. All legal fees incurred in  
24 connection with such arbitration will be the responsibility of the non-prevailing  
25 party. This Agreement shall be governed by and construed in accordance  
26 with the laws of Virginia, USA without regard to its conflicts of laws principles.  
27 Venue shall be in Fairfax County, Virginia, USA.

28 Agreement ¶ 17.

Plaintiff notified Octagon on March 11, 2013 that he was resigning from his  
employment. The following day, March 12, 2013, plaintiff filed the complaint in this action.  
On March 13, 2013, prior to being served with the complaint, Octagon filed and served a  
demand for arbitration with the American Arbitration Association ("AAA") in Virginia,

1 pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. The arbitration  
2 demand seeks a ruling as to whether Octagon can enforce ¶ 7 of the Agreement. On  
3 March 14, 2013, plaintiff served Octagon with the original complaint in this action.

4 On May 31, 2013, pursuant to stipulation, plaintiff filed a second amended complaint  
5 (“SAC”), alleging seven causes of action – five claims for declaratory relief, a claim of unfair  
6 and unlawful business practices in violation of California Business & Professions Code  
7 § 17200, and a claim for civil penalties under the Private Attorney General Act (“PAGA”),  
8 California Labor Code § 2698, et seq.

9 In the first cause of action, plaintiff seeks a judicial declaration that ¶ 4 of the  
10 Agreement is void and unenforceable under California Business & Professions Code  
11 § 16600 because it prohibits plaintiff from being employed by or contracting with a number  
12 of Octagon’s competitors for a period of one year following the termination of his  
13 employment. SAC ¶¶ 17-21.

14 In the second cause of action, plaintiff seeks a judicial declaration that ¶ 5 of the  
15 Agreement is void and unenforceable under § 16600 because it prohibits plaintiff, for a  
16 period of one year, from soliciting or providing services to anyone who was a client or  
17 prospective client of Octagon during the last six months of plaintiff’s employment,  
18 regardless of whether plaintiff had any contact with those clients or prospective clients.  
19 SAC ¶¶ 25-28.

20 In the third cause of action, plaintiff seeks a judicial declaration that ¶ 6 of the  
21 Agreement is void and unenforceable under § 16600 because it subjects plaintiff to several  
22 anticompetitive restrictions following termination of his employment by either party. SAC  
23 ¶¶ 33-35.

24 In the fourth cause of action, plaintiff seeks a judicial declaration that ¶ 7 of the  
25 Agreement is void and unenforceable under § 16600 because it imposes anticompetitive  
26 restrictions on plaintiff’s ability to pursue his business and profession following completion  
27 of his employment with Octagon, and that it is unenforceable as a matter of law under  
28 Labor Code §§ 221, 229, 300, and 2812. SAC ¶¶ 40-46.

1 In the fifth cause of action, plaintiff seeks a judicial declaration that the arbitration  
2 provision in ¶ 17 of the Agreement is procedurally and substantively unconscionable, and  
3 therefore unenforceable as a matter of law; and that it is also unenforceable as a matter of  
4 law under Labor Code § 221. SAC ¶¶ 50-54.

5 In the sixth cause of action, plaintiff alleges that Octagon engaged in unfair and  
6 unlawful business practices in violation of § 17200, including requiring employees to sign  
7 employment contracts containing unfair and illegal provisions such as covenants not to  
8 compete, unconscionable arbitration provisions, illegal recoupment of wages, illegal  
9 recoupment of business expenses, illegal prohibitions on the discussion of wages, and  
10 illegal assignment of wages; and seeking to enforce illegal and unfair provisions against  
11 “employees and former employees including [p]laintiff.” SAC ¶¶ 57-60.

12 In the seventh cause of action, plaintiff asserts a claim for PAGA penalties under  
13 Labor Code § 2699 for himself and every other similarly aggrieved former and current  
14 Octagon employee. SAC ¶¶ 65-68. The claim for PAGA penalties is apparently based on  
15 allegations elsewhere in the complaint that Octagon violated Labor Code §§ 221, 229, 232,  
16 300, and 2802. See SAC ¶¶ 12-13.

17 Octagon now seeks an order dismissing the first, second and third causes of action  
18 pursuant to Federal Rule of Civil Procedure 12(b)(1), on the grounds that there is no case  
19 or controversy; and an order dismissing the sixth and seventh causes of action pursuant to  
20 Federal Rule of Civil Procedure 12(b)(6), on the grounds that plaintiff cannot state a claim  
21 for violation of § 17200, and cannot state a PAGA claim.

22 Octagon also seeks an order dismissing the case for improper venue, pursuant to  
23 Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406(a), based on the forum  
24 selection clause in ¶ 17 of the Agreement. In the alternative, Octagon seeks an order  
25 transferring the case pursuant to 28 U.S.C. § 1406(a) to the Eastern District of Virginia;  
26 and/or an order dismissing the case pursuant to Rule 12(b)(6) for failure to state a claim,  
27 because a valid arbitration provision governs the employment Agreement; and/or an order  
28 pursuant to 9 U.S.C. § 3 staying further proceedings pending completion of the arbitration.

1 Plaintiff opposes Octagon's motion and has also filed a motion seeking an order  
2 staying the arbitration pending a determination by this court of the validity of the arbitration  
3 provision.

#### 4 DISCUSSION

##### 5 A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

6 Octagon seeks an order dismissing the first through third causes of action for lack of  
7 subject matter jurisdiction, arguing that there is no substantial controversy of sufficient  
8 immediacy to justify the issuance of a declaratory judgment.

9 Federal courts are courts of limited jurisdiction, possessing only that power  
10 authorized by Article III of the United States Constitution and statutes enacted by Congress  
11 pursuant thereto. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).  
12 Federal courts have no power to consider claims for which they lack subject-matter  
13 jurisdiction. See Chen-Cheng Wang ex rel. United States v. FMC Corp., 975 F.2d 1412,  
14 1415 (9th Cir. 1992). The burden of establishing that a cause lies within this limited  
15 jurisdiction rests upon the party asserting jurisdiction. Kokkonen v. Guardian Life Ins. Co.  
16 of America, 511 U.S. 375, 377 (1994).

17 The Declaratory Judgment Act provides that "[i]n a case or actual controversy . . .  
18 any court of the United States . . . may declare the rights and other legal relations of any  
19 interested party." 28 U.S.C. 2201(a). This "actual controversy" requirement is consistent  
20 with the Article III requirement to adjudicate only "actual cases or controversies." See U.S.  
21 Const., Art. III, § 2; see also MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127  
22 (2007). To determine whether an "actual controversy" exists for DJA and Article III  
23 purposes, the district court should consider "whether the facts alleged, under all the  
24 circumstances, show that there is a substantial controversy, between parties having  
25 adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a  
26 declaratory judgment." Id. (citation and quotation omitted).

27 The disagreement must be "definite and concrete, touching the legal relations of  
28 parties having adverse legal interests"; and must be "real and substantial" and "admi[t] of

1 specific relief through a decree of a conclusive character, as distinguished from an opinion  
2 advising what the law would be upon a hypothetical state of facts.” Id. (citation and  
3 quotation omitted). “Absent a true case or controversy, a complaint solely for declaratory  
4 relief under 28 U.S.C. 2201 will fail for lack of jurisdiction under Rule 12(b)(1).” Rhoades v.  
5 Avon Prods., 504 F.3d 1151, 1157 (9th Cir. 2007)

6 Octagon asserts that it does not intend to enforce ¶¶ 4, 5, or 6 of the Agreement,  
7 and that the first, second, and third causes of action for declaratory relief are therefore  
8 moot and should be dismissed. Octagon contends that any judicial declaration would be  
9 improper, as it would simply be in the nature of an advisory opinion.

10 In opposition, plaintiff argues that the first, second, and third causes of action  
11 present valid requests for declaratory relief, as each alleges that a provision of the  
12 Agreement is void, as a matter of law, pursuant to Business & Professions Code § 16600.  
13 Plaintiff claims that these are actual controversies that are ripe for adjudication by this  
14 court. Plaintiff contends that while Octagon now claims it does not “intend” to enforce  
15 those portions of the Agreement, it can decide at any time in the future to enforce them.

16 The court finds that the motion must be GRANTED. A representation to a court that  
17 a party will not seek to enforce a covenant not to compete completely moots a claim for  
18 declaratory relief seeking to invalidate a covenant not to compete. See Landers v. Curran  
19 & Connors, Inc., 2006 WL 708948 at \*2 (N.D. Cal. March 21, 2006). Here, Octagon’s  
20 counsel represented to the court, both in its papers filed in support of the present motion,  
21 and in open court during the July 24, 2013 hearing, that it does not intend to seek to  
22 enforce ¶¶ 4, 5, or 6 of the Agreement. Further, on July 29, 2013, Octagon filed a written  
23 Covenant Not To Sue, through which it promises not to take any legal action against  
24 plaintiff with respect to ¶¶ 4, 5, or 6 of the Agreement.

25 Accordingly, the court finds that plaintiff has no basis for asserting that there is an  
26 actual controversy between the parties sufficient to support a claim for declaratory relief as  
27 to ¶¶ 4, 5, or 6 of the Agreement, and he is thus unable to meet his burden of showing  
28 threatened legal action by Octagon.

## 1 B. Motion to Dismiss for Failure to State a Claim

2 Octagon argues that both the sixth cause of action for violation of § 17200 and the  
3 seventh cause of action for PAGA penalties must be dismissed for failure to state a claim.  
4 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged  
5 in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is  
6 limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen. Instrument  
7 Corp., 69 F.3d 381, 385 (9th Cir. 1995).

8 To survive a motion to dismiss for failure to state a claim, a complaint generally must  
9 satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8.  
10 Rule 8(a)(2) requires only that the complaint include a “short and plain statement of the  
11 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Specific facts  
12 are unnecessary – the statement need only give the defendant “fair notice of the claim and  
13 the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007) (citing Bell  
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

15 All allegations of material fact are taken as true. Id. at 94. However, legally  
16 conclusory statements, not supported by actual factual allegations, need not be accepted.  
17 See Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). A motion to dismiss should be granted  
18 if the complaint does not proffer enough facts to state a claim for relief that is plausible on  
19 its face. See Twombly, 550 U.S. at 558-59; see also Iqbal, 556 U.S. at 679.

20 In the sixth cause of action under § 17200, plaintiff identifies the unlawful and unfair  
21 business practices at issue as “requiring employees to sign employment contracts  
22 containing unfair and illegal provisions including covenants not to compete, unconscionable  
23 arbitration provisions, illegal recoupment of wages, illegal recoupment of business  
24 expenses, illegal prohibitions on the discussion of wages, and illegal assignment of wages.”  
25 SAC ¶ 57.

26 Octagon first argues that the § 17200 claim should be dismissed because the SAC  
27 does not allege facts sufficient to show that plaintiff has standing to assert this claim, as he  
28



1 has not suffered an “injury in fact” related to any of the underlying claims.<sup>1</sup> In addition,  
2 Octagon notes that it has agreed not to enforce ¶¶ 4-6 of the Agreement, and argues that  
3 the only substantive portions of the Agreement that are at issue are ¶ 7 (declaratory relief  
4 concerning future fee sharing) and ¶ 17 (arbitration, forum selection, choice of law).  
5 Octagon argues that plaintiff has not explained how he has “suffered injury” or how  
6 Octagon’s pursuit of a declaration of rights concerning future fee-sharing provisions  
7 constitutes an injury in fact.

8 Octagon asserts further that none of the cited sections of the Labor Code support  
9 the § 17200 claim. Labor Code § 221 prohibits employers from collecting any part of  
10 “wages” that were “theretofore paid by said employer to said employee.” Labor Code  
11 § 229 provides that an individual may maintain an action for the collection of due and  
12 unpaid “wages” without regard for the existence of any private agreement to arbitrate.  
13 Labor Code § 300 prohibits the “assignment” of wages unless specific conditions are  
14 satisfied. Octagon contends that Labor Code §§ 221, 229, and 300 are inapplicable  
15 because plaintiff’s claims do not involve “wages” as defined under California law.

16 Under the Labor Code, “wages” include “all amounts for labor performed by  
17 employees of every description, whether the amount is fixed or ascertained by the standard  
18 of time, task, piece, commission basis, or other method of calculation.” Cal. Lab. Code  
19 § 200(a). That is, an employee’s “wages” or “earnings” are “the amount the employer has  
20 offered or promised to pay, or has paid pursuant to such offer or promise, as compensation  
21 for that employee’s labor.” Prachasaisoradej v. Ralphs Grocery Co., Inc., 42 Cal. 4th 217,  
22 228 (2007).

23 Paragraph 7 of the Agreement (which is also the subject of Octagon’s arbitration  
24 petition) refers to payments plaintiff “may” receive in the future after the Employment Period  
25 has ended. As such, Octagon asserts, Labor Code §§ 221, 300, and 229 do not apply and  
26 cannot apply as a basis for an unfair competition claim – since they govern “wages” and the

---

27  
28 <sup>1</sup> This argument appears to be more appropriate for analysis under Rule 12(b)(1) than  
under Rule 12(b)(6).



1 payment of future commissions does not involve the payment of wages. Octagon asserts  
2 further that any claim based on Labor Code § 2802 (reimbursement of business expenses)  
3 is inapplicable because plaintiff does not allege that any of his business expenses were not  
4 reimbursed.

5 Paragraph 11 of the Agreement provides that plaintiff may not discuss his  
6 compensation with any person other than certain specified individuals at Octagon, and his  
7 immediate family and professional advisors. Plaintiff asserts in the “General Allegations”  
8 section of the SAC (not in any cause of action) that this provision violates Labor Code  
9 § 232 as well as § 7 of the National Labor Relations Act; and that by requiring plaintiff to  
10 enter into an employment agreement that violated California law, Octagon committed a  
11 misdemeanor and violated Labor Code § 432.5.

12 Octagon argues that plaintiff cannot state a claim for violation of Labor Code § 232  
13 or § 432.5, or a claim under § 7 of the NLRA because such claims are moot and/or  
14 untimely, given that plaintiff no longer works at Octagon; and that any claim based on Labor  
15 Code § 432.5 (which prohibits an employer from requiring an employee to agree to an  
16 unlawful term it knows is prohibited) necessarily has expired, based on the applicable  
17 three-year statute of limitations.

18 With regard to the PAGA claim, Octagon contends that the claim is insufficiently pled  
19 because it does not identify the Labor Code sections upon which it is based, and because  
20 none of the underlying Labor Code causes of action survive to support a claim for civil  
21 penalties.

22 In opposition, plaintiff argues that he has standing to assert the § 17200 claim based  
23 on an “imminent invasion to a protected interest.” He asserts that he faces a demand for  
24 money that Octagon claims is due and owing, which could amount to as much as 100% of  
25 his earnings for the next two years, and some portion for the two years beyond that.  
26 Plaintiff also contends that the arbitration clause is an unlawful business practice; that ¶¶ 4-  
27 7 of the Agreement violate § 16600, and provide support for a claim of unlawful and unfair  
28 business practices; and that the “clear language” of ¶ 7 of the Agreement violates §§ 221,

229, 300, and 2802 of the California Labor Code.

As for Octagon's argument that the contractual fees received from Octagon's clients or former clients do not constitute "wages" or "expenses" and thus are not controlled by the cited sections of the Labor Code, plaintiff responds that ¶ 7 provides that Octagon can require plaintiff to pay up to 100% of "fees or other compensation" received from those clients after his employment with Octagon ends. Plaintiff asserts that because the Labor Code defines "wages" as "all amounts for labor performed by employees," any of his future "fees and other compensation" necessarily qualifies as "wages."

For example, plaintiff contends, because any such "compensation" would include "wages" he would earn in the future, the prohibition in Labor Code § 300 against "assignment of wages" applies here. He also asserts that the provision in ¶ 7 regarding his obligation to pay Octagon the specified "fees or other compensation" as "consideration for the Company having funded the development of [his] relationship with any of the Company's clients" can only be interpreted as meaning that Octagon is asserting its right to recoup wages and commissions that plaintiff previously earned.

Finally, plaintiff argues that the fact that the PAGA cause of action does not mention the underlying Labor Code violations is unimportant, as it is clear from the rest of the SAC which code sections are being asserted. Moreover, he argues, his letter to the State of California (required before a PAGA claim can be asserted) states that Octagon violated Labor Code §§ 221, 432.5, and 2802.

The court find that the motion must be GRANTED. First, plaintiff has not established that he has standing to bring a claim under § 17200. To establish a "case or controversy" within the meaning of Article III, a plaintiff must show an "injury in fact" which is concrete and not conjectural, a causal causation between the injury and defendant's conduct or omissions, and a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); see also Allen v. Wright, 468 U.S. 737, 751 (1984).

Standing is "an essential and unchanging part of the case-or-controversy

requirement of Article III.” Lujan, 504 U.S. at 560. Standing is not subject to waiver, and must be considered by the court even if the parties fail to raise it. See United States v. Hays, 515 U.S. 737, 742 (1995). The burden is on the party who seeks the exercise of jurisdiction in his or her favor to “clearly . . . allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.” Id. at 743.

A private action for violation of California Business & Professions Code § 17200 may only be brought “by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204; see also Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 320-21 (2011) (private standing under § 17200 is now “limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition”) (quotation omitted); Rubio v. Capital One Bank, 613 F.3d 1195, 1204-05 (9th Cir. 2010) (UCL requires plaintiff to “show that she has lost ‘money or property’ sufficient to constitute an ‘injury in fact’ under Article III of the Constitution . . . , and also requires a ‘causal connection’ between [defendant’s] alleged [Section 17200] violation and her injury in fact”) (citations omitted). An absence of facts describing the money or property allegedly lost is fatal to a plaintiff’s § 17200 claim. Saldate v. Wilshire Credit Corp., 711 F. Supp. 2d 1126, 1137 (E.D. Cal. 2010); see also Kwikset, 51 Cal. 4th at 323.

As stated above, the claims with regard to ¶¶ 4-6 of the Agreement are dismissed for lack of declaratory judgment jurisdiction. As for the claims regarding ¶ 7 of the Agreement, plaintiff alleges in the SAC that his “present and future property interest in fees paid pursuant to contracts” he negotiated “is diminished by [Octagon’s] stated intent to enforce contractual provisions,” and that he is also “subject to an imminent invasion or injury to his legally protected interests in both pursuing his chosen profession, and earning fees and commissions from negotiated contracts.” SAC ¶ 59.

Nevertheless, plaintiff has not alleged facts showing that the future sharing of fees that he may or may not earn at some indeterminate date constitutes an “actual or imminent” injury that is “concrete and particularized.” Because he has not shown the

invasion of a legally protected interest, which is concrete and particularized, and actual and imminent, not conjectural or hypothetical, Lujan, 504 U.S. at 560, he fails to show that he has standing to assert the § 17200 claim.

Second, plaintiff cannot rely on the arbitration provision to establish his § 17200 claim. He has cited no authority holding that an unconscionable arbitration provision can form the basis of a § 17200 claim, and the court is unaware of any. Unconscionability is a defense to the enforcement of a contract, not an independent cause of action, unless there is some statutory basis for asserting an affirmative cause of action for unconscionability. See California Grocers Ass'n v. Bank of America, 22 Cal. App. 4th 205, 217 (1994); see also Rubio, 613 F.3d at 1205.<sup>2</sup>

Third, plaintiff has failed to state a claim under § 17200 claim based on the alleged violations of the Labor Code. As stated above, Labor Code §§ 221, 229, and 300 all involve “wages.” However, the “fee-sharing” provision in ¶ 7 of the Agreement does not implicate “wages” payable by Octagon to plaintiff, since the payment of “wages” requires an employer-employee relationship, which no longer exists here. See Cal. Lab. Code § 200(a) (defining “wages” as “all amounts for labor performed by employees”) (emphasis added). Since plaintiff is no longer an “employee” of Octagon, and has not been since March 11, 2013, and his claims with regard to “wages” do not apply to “amounts for labor” he performed prior to that date, the provisions of the Labor Code relating to “wages,” such as § 221, § 229, and § 300, do not apply.

Under Labor Code § 2802, an employer is required to “indemnify” his/her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer.” Cal. Lab. Code § 2802(a). Octagon, however, is not attempting to recoup business expense reimbursements, as “funding the development” of plaintiff’s relationships

---

<sup>2</sup> Moreover, to the extent that plaintiff’s § 17200 claim is based on the allegation that Octagon “required” him to enter into an employment contract that contained unfair and illegal provisions, such a claim is arguably time-barred, given that plaintiff signed the Agreement on April 22, 2008, and did not file the present action until March 12, 2013.

with Octagon's clients as alleged does not involve business expenses incurred by plaintiff.

As for the claims based on Labor Code § 232 and § 7 of the NLRA, those claims are moot in view of the fact that plaintiff no longer works at Octagon. In addition, the claim regarding Labor Code § 432.5 (prohibiting an employer from requiring an employee to agree to an unlawful term) occurred, if at all, at the time plaintiff signed the Agreement, and is therefore time-barred.

Finally, a PAGA claim is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties," wherein the aggrieved employee's action "functions as a substitute for an action brought by the government itself." Arias v. Super. Ct., 46 Cal. 4th 969, 986-87 (2009). It is "a procedural statute allowing an aggrieved employee to recover civil penalties – for Labor Code violations – that otherwise would be sought by state labor law enforcement agencies." Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, 46 Cal. 4th 993, 1003 (2009).

It is undisputed that a PAGA claim must be based on an underlying violation of the Labor Code. See Cal. Labor Code § 2699(a) ("any provision of this code that provides for a civil penalty . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees . . ."). Here, plaintiff has alleged no viable claim based on Labor Code violations that could give rise to a PAGA claim for civil penalties, and the PAGA claim must therefore be dismissed.

#### C. Motion to Dismiss or Transfer for Improper Venue

Octagon argues that the action should be dismissed or transferred for improper venue, based on the provision in ¶ 17 of the Agreement that "[v]enue shall be in Fairfax County, Virginia, USA." Octagon asserts that enforcement of the forum-selection clause has no bearing on the enforceability of the arbitration provision, and contends that the court should determine venue first.

A motion to enforce a forum selection clause is treated as a motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3); pleadings need not

1 be accepted as true, and facts outside the pleadings may be considered. Doe 1 v. AOL  
2 LLC, 552 F.3d 1077, 1081 (9th Cir. 2009). However, the trial court “must draw all  
3 reasonable inferences in favor of the non-moving party and resolve all factual conflicts in  
4 favor of the non-moving party.” Murphy v. Schneider Nat’l, Inc., 362 F.3d 1133, 1138 (9th  
5 Cir. 2003).

6 Plaintiff argues that the forum-selection clause applies only to the forum designated  
7 for arbitration. That is, he contends that the Agreement itself does not contain a forum-  
8 selection clause as such, as it makes no mention of judicial venue or court proceedings, but  
9 rather that it simply includes an arbitration provision that specifies a particular forum. Thus,  
10 he claims that because the parties agreed to a forum for arbitration, but not for other  
11 litigation, there is no forum-selection clause that governs this action.

12 The court finds that Octagon’s motion must be DENIED. In order to find that the  
13 present case should be dismissed or transferred for improper venue, the court must find  
14 that the parties designated an alternative forum for civil actions. Paragraph 17 of the  
15 Agreement, which contains the purported “forum-selection clause,” includes a number of  
16 provisions, set forth in six sentences.

17 In the first sentence, ¶ 17 states that “[a]ll controversies arising out of or relating to  
18 this Agreement . . . shall be settled by arbitration.” In the second sentence it states that the  
19 decision of the arbitrator shall be “final, binding, and non-appealable.” In the third sentence  
20 it states that judgment upon the arbitration award “may be entered in any court having  
21 jurisdiction thereof.” In the fourth sentence, it states that all legal fees incurred in  
22 connection with such arbitration shall be paid by the non-prevailing party. In the fifth  
23 sentence, it states that “[t]his Agreement shall be governed by and construed in  
24 accordance with the laws of Virginia.” In the sixth sentence, it states that “[v]enue shall be  
25 in Fairfax County, Virginia.”

26 As with any contractual provision, the court must give the words of a forum-selection  
27 clause their “common or normal meaning . . . unless circumstances show that in a  
28 particular case a special meaning should be attached.” Hunt Wesson Foods, Inc. v.

1 Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987). Ambiguous language is construed  
2 against the drafter of the contract. Id. at 78; see also Insurance Co. of North Am. v. NNR  
3 Aircargo Service (USA), Inc., 201 F.3d 1111, 1114 (9th Cir. 2000).

4 While it is undisputed that the Agreement provides that plaintiff and Octagon will  
5 arbitrate all disputes regarding the Agreement, and also that the Agreement will be  
6 construed under Virginia law, it is not clear whether the venue provision in the sixth  
7 sentence of ¶ 17 applies to the arbitration only, or more broadly to any civil action involving  
8 the Agreement.

9 Because the gist of ¶ 17 is that only an arbitral forum – not a judicial forum – is  
10 available for the resolution of disputes “arising out of or relating to” the Agreement, it  
11 appears more likely that the forum-selection clause specifies the location of the arbitration  
12 only. At best, the court can say that the provision is ambiguous, and thus, must be  
13 construed against Octagon, the drafter of the Agreement. Accordingly, the motion to  
14 transfer or dismiss the present civil action for improper venue must be DENIED.

#### 15 D. Motions to Stay

16 Octagon seeks an order pursuant to FAA § 3 dismissing the present action or  
17 staying further proceedings pending resolution of the arbitration; while plaintiff seeks an  
18 order staying the arbitration pending resolution by this court of the question whether the  
19 arbitration provision is enforceable.

20 The FAA was designed to promote arbitration. AT&T Mobility LLC v. Concepcion,  
21 131 S.Ct. 1740, 1749 (2011). Indeed, it embodies a “national policy” favoring arbitration  
22 agreements, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006),  
23 “notwithstanding any state substantive or procedural policies to the contrary,” Moses H.  
24 Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983); and reflects the  
25 “fundamental principle that arbitration is a matter of contract,” Rent-A-Center West, Inc. v.  
26 Jackson, 130 S.Ct. 2772, 2776 (2010). The FAA “mandates that district courts shall direct  
27 the parties to proceed to arbitration on issues as to which an arbitration agreement has  
28 been signed.” Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985).



1 A party to a lawsuit pending in federal court may seek a stay of the action pending  
2 arbitration of one or more issues raised by the litigation. Wagner v. Stratton Oakmont, Inc.,  
3 83 F.3d 1046 (9th Cir. 1996); see 9 U.S.C. § 3. Alternatively, when all claims asserted in  
4 the litigation are subject to arbitration, the court may choose to dismiss the action in its  
5 entirety for the failure to state a claim under Rule 12(b)(6). Sparling v. Hoffman Constr.  
6 Co., 864 F.2d 635, 638 (9th Cir. 1988).

7 The basic role for courts under the FAA is to determine whether a valid agreement to  
8 arbitrate exists and, if it does, whether the agreement encompasses the dispute at issue.  
9 Kilgore v. KeyBank, N.A., 718 F.3d 1052, 1058 (9th Cir. 2013). Octagon asserts that ¶ 17  
10 of the Agreement constitutes a valid agreement to arbitrate that covers any claims raised  
11 by plaintiff in the present action. Plaintiff does not dispute that he signed the Agreement,  
12 which includes the arbitration provision. He contends, however, that rather than staying or  
13 dismissing this action, the court should instead stay the arbitration proceeding. He asserts  
14 that under the appropriate choice-of-law analysis, California law applies, and that under  
15 California law, the arbitration agreement is invalid and unenforceable.

16 The court finds that Octagon's motion must be GRANTED, and that plaintiff's motion  
17 must be DENIED. Section 2 of the FAA provides that arbitration agreements are  
18 "enforceable, save upon such grounds as exist at law or in equity for the revocation of any  
19 contract." 9 U.S.C. § 2. This clause "preserves generally applicable contract defenses."  
20 Conception, 131 S.Ct. at 1748; see also Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681,  
21 685-87 (1996) (state law that "arose to govern issues concerning the validity, revocability,  
22 and enforceability of contracts generally" remains applicable to arbitration agreements)  
23 (citation and quotation omitted).<sup>3</sup> Here, plaintiff contends that the arbitration provision is  
24 unconscionable under California law, and is therefore unenforceable. Octagon asserts that  
25 Virginia law applies, but that the arbitration provision is enforceable regardless of which law

---

26  
27 <sup>3</sup> However, attacks on the validity of the contract, as distinct from attacks on the validity  
28 of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by  
a federal or state court." Nitro-Lift Techs. LLC v. Howard, 133 S.Ct. 500, 503 (2012).

1 applies.

2 Where a federal court exercises jurisdiction over state law claims, the court “applies  
 3 the choice-of-law rules of the forum state.” Paracor Fin., Inc. v. GE Elec. Capital Corp., 96  
 4 F.3d 1151, 1164 (9th Cir. 1996); see also Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S.  
 5 487, 496 (1941); Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000). When an  
 6 agreement contains a choice-of-law provision, California courts apply the parties’ choice of  
 7 law unless the approach set forth in Restatement (Second) of Conflict of Laws § 187  
 8 dictates a different result. Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622  
 9 F.3d 996, 1002 (9th Cir. 2012).

10 Under the Restatement approach, the court must first determine whether the chosen  
 11 state has a substantial relationship to the parties or their transaction, or whether there is  
 12 any other reasonable basis for the parties’ choice of law. Id. (citing Nedlloyd Lines B.V. v.  
 13 Superior Court, 3 Cal. 4th 459, 465-66 (1992)). If either test is met, the court must  
 14 determine whether the chosen state’s law is contrary to a fundamental policy of California.  
 15 Id. If so, the court must determine whether California has a materially greater interest than  
 16 the chosen state in the determination of the particular issue, and if that is the case, the  
 17 court applies California law, notwithstanding the choice-of-law provision. Id. at 1002-03.

18 The party advocating application of the choice-of-law provision has the burden of  
 19 establishing a substantial relationship between the chosen state and the contracting  
 20 parties. See Washington Mut. Bank v. Superior Court, 24 Cal. 4th 906, 915-16 (2001);  
 21 Peleg v. Neiman Marcus Group, Inc., 204 Cal. App. 4th 1425, 1447 (2012). The burden  
 22 then shifts to the party opposing application to show that application would violate a  
 23 fundamental policy of California. See Washington Mut. Bank, 24 Cal. 4th at 916.

24 Octagon argues that the substantial relationship test is met in this case because  
 25 Octagon – the only defendant – has its corporate headquarters in Virginia. A “substantial  
 26 relationship” between the chosen state and the contracting parties exists if “one of the  
 27 parties is domiciled in the chosen state.” Nedlloyd Lines, 3 Cal. 4th at 467-68. Further, “if  
 28 one of the parties resides in the chosen state, the parties have a reasonable basis” for

1 selecting that state. Id.

2 In addition, Octagon contends, there is no conflict in the respective states' law on  
3 arbitration. Virginia follows a Uniform Arbitration Act, which mirrors the FAA regarding the  
4 validity of an arbitration agreement. In addition, just as in California, arbitration clauses in  
5 Virginia are applied like any other contract provision, and the agreement to arbitrate must  
6 be interpreted just as any other contract. See Giordano ex rel. Estate of Brennan v. Atria  
7 Assisted Living, Virginia Beach LLC, 429 F.Supp. 2d 732, 736 (E.D. Va. 2006). Octagon  
8 notes that this includes the rule that a contract may be deemed unenforceable under the  
9 doctrine of unconscionability, which deals both with bargaining power and the fairness of  
10 the agreement.

11 Plaintiff does not dispute this proposition, but argues that application of Virginia law  
12 would violate a major public policy of California, in that the arbitration agreement conflicts  
13 with California's public policy against unconscionable arbitration agreements, as set forth  
14 by the California Supreme Court in Armendariz. Plaintiff also contends that application of  
15 Virginia law would violate California policy regarding the viability of covenants not to  
16 compete.

17 It is apparent that California and Virginia view covenants not to compete differently.  
18 In California, Business & Professions Code § 16600 prohibits any contract "by which  
19 anyone is restrained from engaging in a lawful profession, trade or business of any kind."  
20 Cal. Bus. & Prof. Code § 16600; see also Application Group, Inc. v. Hunter Group, Inc., 61  
21 Cal. App. 4th 881, 887-901 (1998). Section 16600 reflects California's "strong interest in  
22 protecting its employees from noncompetition agreements." Advanced Bionics v.  
23 Medtronic, Inc., 29 Cal. 4th 697, 706-07 (2002).

24 By contrast, while Virginia law disfavors covenants not to compete as restraints of  
25 competition, such covenants may survive if they are found not to be unreasonable. See  
26 Capital One Fin. Corp. v. Kanas, 871 F.Supp. 2d 520, 527 (E.D. Va. 2012) (citing Foti v.  
27 Cook, 220 Va. 800, 805 (1980)). Where a covenant not to compete is ancillary to an  
28 employer/employee relationship (rather than to the sale of a business), the scope of

1 permissible restraint will be more limited, and the covenant will be construed favorably to  
2 the employee. Id. (citing Richardson v. Paxton Co., 203 Va. 790, 795 (1962)).

3 A restrictive covenant in the employment context may be enforceable, however, if  
4 the employer shows that the contract is narrowly drawn to protect the employer's legitimate  
5 business interests and not unduly burdensome on the employee's ability to earn a living,  
6 and that it is reasonable from a perspective of public policy. See Preferred Sys. Solutions,  
7 Inc. v. GP Consulting, LLC, 284 Va. 382, 392-93 (2012); Foti, 220 Va. at 805. The  
8 emphasis of the Virginia Supreme Court has been on deciding each non-compete  
9 agreement on its own facts. Capital One, 871 F.Supp. 2d at 530.

10 Plaintiff contends that the public policy reflected in § 16600 is sufficient to override  
11 the parties' choice-of-law provision, since applying the law of Virginia would hamper  
12 California's ability to protect the employment interests of its residents. Octagon asserts,  
13 however, that what the court is required to evaluate is whether there is any conflict between  
14 the law of California and the law of Virginia regarding the enforceability of agreements to  
15 arbitrate – not the conflict in the substantive law governing the causes of action alleged in  
16 the SAC. Octagon notes that both Virginia and California strongly favor arbitration and  
17 have statutes that mirror the FAA, and that both recognize principles of unconscionability.  
18 Thus, Octagon contends, the arbitration provision would be enforceable under the laws of  
19 Virginia and under non-Armendariz California law.

20 In support of its argument that "the substantive law" is "not relevant" in the choice-of-  
21 law analysis, Octagon cites a recent decision by the California Court of Appeal. See Peleg  
22 v. Neiman Marcus Group, Inc., 204 Cal. App. 4th 1425, 1446 (2012). The facts in the  
23 Peleg case are distinguishable from those in the present case, however, and the court is  
24 not persuaded that Octagon's approach is the correct one. In Peleg, the employment  
25 agreement at issue was a "Mandatory Arbitration Agreement" that the plaintiff had been  
26 given at the time he was hired. The agreement was a standalone agreement that  
27 addressed only one subject – arbitration. Id. at 1435-36. It included a choice-of-law  
28 provision that specified that the applicable law would be the law of Texas and the FAA. Id.

1 at 1435.

2 The question for the court was whether the question of enforceability should be  
3 decided by the court or by the arbitrator. Notwithstanding the choice-of-law provision, the  
4 parties did not argue that the law of a particular jurisdiction should be applied in resolving  
5 the issue, and the Court of Appeal therefore determined that it would apply California law  
6 “by default.” *Id.* at 1442. Moreover, the court noted, the parties had relied on California law  
7 in briefing the issue. *Id.* Later in the opinion, however, the court expressly considered  
8 whether Texas law or the FAA was contrary to a fundamental policy of California with  
9 regard to the question whether the arbitration agreement was illusory. The court found no  
10 conflict, and concluded that Texas law would govern the question whether the agreement  
11 was enforceable. *Id.* at 1466-67. Thus, there was no clear ruling in the decision that could  
12 assist this court in deciding whether it is precluded in its conflicts-of-law analysis from  
13 considering conflicts between California law and Virginia law with regard to covenants not  
14 to compete.

15 Accordingly, to the extent that the SAC alleges a viable claim under § 16600 (an  
16 issue not before the court), the court finds that plaintiff has sufficiently established that  
17 California has a materially greater interest in the determination of the enforceability of any  
18 such non-compete agreement. Accordingly, the court applies California law.

19 Plaintiff argues that the arbitration provision at issue in this case is unconscionable  
20 and therefore unenforceable under the analysis set forth by the California Supreme Court in  
21 Armendariz v. Foundation Health Psychare Servs., Inc., 24 Cal. 4th 83 (2000). As  
22 summarized by Armendariz, unconscionability has both procedural and substantive  
23 elements. *Id.* at 99. Although both must appear for a court to invalidate a contract or one  
24 of its individual terms, they need not be present in the same degree – “[T]he more  
25 substantively oppressive the contract term, the less evidence of procedural  
26 unconscionability is required to come to the conclusion that the term is unenforceable, and  
27 vice versa.” *Id.* at 114. Plaintiff contends that both procedural and substantive  
28 unconscionability are present here.

Procedural unconscionability “addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power.” Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US), 55 Cal. 4th 223, 246 (2012) (citing Armendariz, 24 Cal. 4th at 114); see also Roman v. Superior Court, 172 Cal. App. 4th 1462, 1470 (2009). “Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice,” while “[s]urprise involves the extent to which the terms of the bargain are hidden in a ‘prolix printed form’ drafted by a party in a superior bargaining position.” Serpa v. California Surety Investigations, Inc., 215 Cal. App. 4th 695, 703 (2013) (citations and quotations omitted); see also Mercurio v. Superior Court, 96 Cal. App. 4th 167, 174 (2002) (“procedural unconscionability focuses on the oppressiveness of the stronger party’s conduct”).

In analyzing procedural unconscionability, the court first focuses on whether the contract was one of adhesion. Soltani v. W. & S. Life Ins. Co., 258 F.3d 1038, 1042 (9th Cir. 2001). A contract of adhesion is “a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” Armendariz, 24 Cal.4th at 113. Under California law, a contract of adhesion has an element of procedurally unconscionability because it is “presented on a take-it-or-leave-it basis and [is] oppressive due to ‘an inequality of bargaining power that result[ed] in no real negotiation and an absence of meaningful choice.’” Nagrampa v. MailCoups Inc., 469 F.3d 1257, 1281 (9th Cir. 2006).

Plaintiff contends that the July 10, 2006 Agreement is procedurally unconscionable because it is a contract of adhesion. He claims that its material terms are “standardized parts of a form Octagon contract;” that other employees were presented with the same provisions, including the arbitration provision; and that he had no meaningful opportunity to accept or reject any of the provisions including the arbitration provision. He asserts that the fact that he attended law school, was an experienced negotiator, and was represented by counsel is of little consequence, because Octagon told him and his attorney that there would be no negotiation of material terms. He asserts that because the Agreement

(including the arbitration provision) was presented on a “take it or leave it” basis, it was per se unconscionable.<sup>4</sup>

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an “overly harsh” or “one-sided” result, Armendariz, 24 Cal. 4th at 114; see also Little v. Auto Stiegler, Inc., 29 Cal. 4th 1064, 1071 (2003) – that is, the question “whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner.” Serpa, 215 Cal. App. 4th at 703. Substantive unconscionability “may take various forms,” but typically is found in the employment context when the arbitration agreement is “one-sided” in favor of the employer without sufficient justification, for example, when “the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.” Id. (citations and quotations omitted).

Plaintiff asserts that the arbitration provision is substantively unconscionable because it is not mutual, in that Octagon can seek injunctive relief in court and without showing damages, while plaintiff cannot, see Agreement ¶ 12; because it impermissibly shifts attorney’s fees for unsuccessful employment claims to the plaintiff, see Agreement ¶ 17); because the AAA rules will require him to pay significant arbitration fees if he wants to add his own claims, which he would not have to do in a judicial forum; and because it requires him to pursue his claims in Virginia, an “unfavorable forum,” where he claims he will incur significant additional costs which in turn will “significantly diminish[ ] his rights contrary to California public policy.”

Plaintiff also contends that the selection of Virginia as the location of the arbitration will shield Octagon from liability, because the arbitrator will be likely to apply Virginia law, which (according to plaintiff) would effectuate a “waiver” of statutory remedies, including

---

<sup>4</sup> The court notes that the question whether the Agreement as a whole is unconscionable is not presently before it. A challenge to the validity of an agreement to arbitrate is to be decided by the court without reference to the larger contract. Rent-A-Center, 130 S.Ct. at 2778. That is, the “‘arbitration provision is severable from the remainder of the contract,’ . . . and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.” Nitro-Lift Techs., 133 S.Ct. at 503 (citations and quotations omitted).



1 remedies under Business & Professions Code § 16600 and the California Labor Code. He  
2 argues that his PAGA and “wage” claims are not arbitrable. He contends that whatever the  
3 court decides with regard to the arbitration claims, the PAGA claims should remain before  
4 this court, and that to avoid duplication, all the claims should remain here.

5 In response, Octagon contends that Armendariz is inapplicable here, because the  
6 analysis extends only to the court’s review of unconscionability in mandatory employment  
7 arbitration agreements involving statutory anti-discrimination claims. Here, Octagon  
8 asserts, the claims alleged do not involve statutory anti-discrimination claims. In support,  
9 Octagon cites Giulano v. Inland Island Personnel, Inc., 149 Cal. App. 4th 1276, 1290-91  
10 (2007), where the court held that Armendariz did not apply to breach of contract claims for  
11 a multimillion-dollar bonus and severance payment because such claims are  
12 distinguishable from unwaivable statutory claims for federally mandated overtime and  
13 minimum wage payments; and Parker v. McGaw, 125 Cal. App. 4th 1494, 1507 (2005),  
14 where the court held that Armendariz did not apply where the plaintiff’s claims were not  
15 brought under FEHA, the plaintiff had the opportunity to negotiate the terms of employment,  
16 and the plaintiff earned a high annual salary and was also an attorney.

17 Octagon contends that because there is no other public policy that prevents the  
18 application of Virginia law on the issue of the enforceability of the arbitration provision,  
19 Virginia law applies, and argues that the arbitration provision is valid and enforceable under  
20 Virginia law. Octagon also argues, however, that the arbitration provision is enforceable  
21 under California law. Octagon apparently concedes that there is some degree of  
22 procedural unconscionability in the arbitration provision, but also notes that the evidence  
23 shows that plaintiff was given the opportunity to negotiate the Agreement’s provisions with  
24 the advice of counsel, and confirmed that he did, in fact, have an attorney review the  
25 Agreement before he signed it. He assented to the Agreement by signing it on August 7,  
26 2006, and initialed every page, including the two pages on which the arbitration provision is  
27 found. He also worked under the Agreement for several years.

28 Octagon contends that as a sports agent, plaintiff is an experienced negotiator with

1 years of experience, and was hired by Octagon in part because he had substantial  
2 experience in this area. Indeed, Octagon contends, sports agents in plaintiff's position are  
3 required by the National Football League Players Association to be certified as Contract  
4 Advisors pursuant to the NFLPA regulations. Thus, Octagon argues, there is no evidence  
5 of inequality in bargaining power, such that the arbitration provision should be found to be  
6 unenforceable.

7 Adhesion contracts in the employment context "typically contain some aspects of  
8 procedural unconscionability." Serpa, 215 Cal. App. 4th at 704 (citing Armendariz, 24 Cal.  
9 4th at 115). Here, however, the Agreement (which includes the arbitration provision)  
10 provides that plaintiff "acknowledges that the provisions of this Agreement were discussed  
11 in principle at the time the offer [of employment] was made," and that he "stated [his]  
12 consent to the type of restrictions set forth in this Agreement as a condition of [his]  
13 employment." Agreement ¶ 1. In addition, plaintiff "acknowledges that he has been  
14 afforded the opportunity to have this Agreement reviewed on his behalf by legal counsel of  
15 his own choosing and at this own expense . . . ." Agreement ¶ 18. This differs from the  
16 more typical adhesive employment agreement, such as the agreement at issue in Serpa,  
17 which provided that "by accepting or continuing in employment," the employee agreed to  
18 the terms of the arbitration agreement. Serpa, 215 Cal. App. 4th at 704.

19 Moreover, Octagon has presented evidence showing not only that plaintiff had the  
20 opportunity to negotiate the terms of the Agreement, but also that he took advantage of that  
21 opportunity. There is no evidence with regard to any negotiation of the arbitration  
22 provision, but given that the adhesive aspect of an agreement is not dispositive, see  
23 Roman, 172 Cal. App. 4th at 1471 & n.2; and given that there is no other indication of  
24 oppression or surprise (such as grossly unequal bargaining power, or the concealment by  
25 Octagon of the terms of the agreement in a "prolix printed form"), the court concludes that  
26 the degree of procedural unconscionability is low. See, e.g., Miguel v. JPMorgan Chase  
27 Bank, N.A., 2013 WL 452418 at \*6 (C.D. Cal. Feb. 5, 2013) (citing Lagatree v. Luce,  
28 Forward, Hamilton & Scripps, 74 Cal. App. 4th 1105, 1127 (1999); Hodsdon v. DirecTV,

1 LLC, 2012 WL 5464615 at \*5 (N.D. Cal. Nov. 8, 2012) (citing Gatton v. T-Mobile USA, Inc.,  
 2 152 Cal. App. 4th 571, 585 (2007)).

3 Plaintiff also contends that the arbitration provision is procedurally unconscionable  
 4 because it provides that the AAA rules will apply, but fails to attach those rules to the  
 5 Agreement. It is true that some courts have held that the failure to provide arbitration rules  
 6 can be deemed procedurally unconscionable, see Sparks v. Vista Del Mar Child and Family  
 7 Servs., 207 Cal. App. 4th 1511, 1523 (2012); Trivedi v. Curexco Technology Corp., 189  
 8 Cal. App. 4th 387, 393 n.4 (2010); Harper v. Ultimo, 113 Cal. App. 4th 1402, 1406-07  
 9 (2003). However, other cases have held that procedural unconscionability can be avoided  
 10 if the arbitration rules are incorporated into the contract by reference, such incorporation is  
 11 clear, and the rules are readily available. See, e.g., Ulbrich v. Overstock.Com, Inc., 2012  
 12 WL 3631498, at \*6 (N.D. Cal. Aug.15, 2012); see also Medlin Ins. Agency v. QBE Ins.  
 13 Corp., 2012 WL 2499952, at \*5 (E.D. Cal. June 27, 2012) (failure to provide arbitration  
 14 rules is not, itself, enough to establish procedural unconscionability).

15 Here, the arbitration provision incorporates the AAA rules clearly and explicitly,  
 16 stating that “[a]ll controversies or claims . . . shall be settled by arbitration in accordance  
 17 with the Rules of the American Arbitration Association.” Agreement ¶ 17. Plaintiff has not  
 18 attempted to argue that the AAA rules are not, or have not been, available. Most of  
 19 plaintiff’s argument consists of speculation regarding possible negative consequences were  
 20 he compelled to proceed under the AAA rules governing arbitration of large commercial  
 21 disputes.

22 Octagon did not engage in the type of conduct necessary to find a “high degree” of  
 23 procedural unconscionability. Because plaintiff received some (though not all) of the  
 24 concessions he wanted through the negotiation process, the Agreement cannot be  
 25 considered a “standardized form contract” presented with only the opportunity to take it or  
 26 leave it. There is no evidence that plaintiff was threatened or bullied into signing the  
 27 agreement. See Mercuro, 96 Cal. App. 4th at 175.

28 The evidence shows that plaintiff and Octagon engaged in negotiation over a period

1 of days, and that plaintiff consulted with legal counsel during that process. Plaintiff does  
 2 not claim he felt oppressed when he signed the Agreement. Thus, the court finds that the  
 3 arbitration agreement must be enforced unless the degree of substantive unconscionability  
 4 is high. See Ajamian v. CantorCO2e, 203 Cal. App. 4th 771, 796 (2012); Dotson v.  
 5 Amgen, Inc., 181 Cal. App. 4th 975, 981-82 (2010); see also Roman, 172 Cal. App. 4th at  
 6 1471 n.2 (“[w]hen bargaining power is not grossly unequal and reasonable alternatives  
 7 exist, oppression typically inherent in adhesion contracts is minimal”).

8 The court finds that plaintiff has failed to make that showing. He has not shown that  
 9 the arbitration provision requires Octagon (but not plaintiff) to arbitrate claims, or that it  
 10 imposes a shorter statute of limitations than is available under state law. See Martinez v.  
 11 Master Protection Corp., 118 Cal. App. 4th 107, 114-18 (2004). Nor is there any showing  
 12 that the arbitration agreement exempts any particular type of claim from arbitration, as it  
 13 requires arbitration of “[a]ll controversies or claims” relating to the Agreement. The  
 14 arbitration agreement places no limitation on discovery, and plaintiff has not demonstrated  
 15 that he is financially or physically unable to travel to Virginia for the arbitration.

16 With regard to the “loser pays” attorney’s fees provision, the claim submitted to  
 17 arbitration is based on the enforceability of a contract. In Pokorny v. Quixtar, Inc., 601 F.3d  
 18 987 (9th Cir. 2010), the case on which plaintiff relies, the Ninth Circuit found a “loser pays”  
 19 provision in the arbitration agreement to be substantively unconscionable because it  
 20 required the losing party to bear all costs of the arbitration, including the prevailing party’s  
 21 attorney’s fees. See id. at 1004-05. Here, however, the arbitration agreement requires  
 22 only that the losing party pay the “legal fees incurred in connection with such arbitration.”

23 Octagon asserts that under California Civil Code § 1717, the parties are entitled to  
 24 attorney’s fees if there is an appropriate contractual provision, and thus, plaintiff would be  
 25 required to pay attorney’s fees if he lost in litigation, and will not receive a less favorable  
 26 treatment in the arbitration. However, the Agreement does not include any provision  
 27 requiring the losing party in litigation to pay attorney’s fees – but only a requirement with  
 28 regard to arbitration. Accordingly, the court finds that because this “loser pays” provision

1 seeks to impose a greater burden on the non-prevailing party in arbitration than it would on  
2 the same party in litigation, it is substantively unconscionable.

3 With regard to the provision in ¶ 12 that entitles Octagon to seek an injunction to  
4 stop a breach of the Agreement by plaintiff without the necessity of proving damages, the  
5 court agrees with plaintiff that (to the extent this provision is applicable to arbitration) it  
6 renders the agreement one-sided, assuming its intent is to preclude plaintiff from seeking  
7 similar relief in appropriate circumstances.

8 As to these last two provisions, however, California law allows the court to sever any  
9 unconscionable provisions so long as they are “merely collateral to the main purpose of the  
10 arbitration agreement.” See Grabowski v. Robinson, 817 F.Supp. 2d 1159, 1179 (S.D. Cal.  
11 2011) (citing Armendariz, 24 Cal. 4th at 124); see also Pokorny, 601 F.3d at 1005. The  
12 court finds that the central purpose of the agreement is not “tainted with illegality,” and that  
13 the two provisions described above can easily be severed from the agreement.

#### 14 CONCLUSION

15 In accordance with the foregoing, the court hereby GRANTS Octagon’s motion to  
16 dismiss the first through third causes of action for lack of subject matter jurisdiction;  
17 GRANTS Octagon’s motion to dismiss the sixth and seventh causes of action for failure to  
18 state a claim; DENIES Octagon’s motion to dismiss or transfer for improper venue;  
19 GRANTS Octagon’s motion stay this action pending resolution of the arbitration; and  
20 DENIES plaintiff’s motion to stay the arbitration.

21 This proceeding is hereby STAYED pending arbitration. The parties shall notify the  
22 court immediately upon a determination of the arbitration demand.

23  
24 **IT IS SO ORDERED.**

25 Dated: September 12, 2013



26 PHYLLIS J. HAMILTON  
27 United States District Judge  
28